

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1230

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

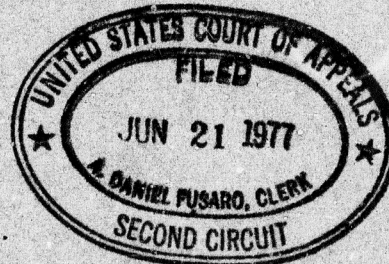
DOCKET NO. 77-1230

B
P/S

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
V.
VICTOR W. SYMS,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANT
VICTOR W. SYMS



RICHARD S. CRAMER
ASSISTANT FEDERAL PUBLIC DEFENDER
450 MAIN STREET
HARTFORD, CONNECTICUT 06103
ATTORNEY FOR DEFENDANT-APPELLANT

- i -

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Statement of Issues	iv
Statement of the Case	1
Argument	
THE COURT ERRED IN REFUSING TO SUPPRESS ORAL AND WRITTEN CONFESSIONS MADE BY DEFENDANT SYMS, SINCE THEY WERE THE PRODUCT OF AN ILLEGAL ARREST ENTRY OF THE HOME OF A THIRD PARTY IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION	5
Conclusion	12
Certificate of Service	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975)	10
<u>Bumper v. North Carolina</u> , 391 U.S. 543 (1968)	10
<u>Chambers v. Maroney</u> , 399 U.S. 42 (1970)	7
<u>Fisher v. Volz</u> , 496 F.2d 333 (3d Cir. 1974)	6,7
<u>Government of Virgin Islands v. Gereau</u> , 502 F.2d 914 (3d Cir. 1974)	6,9
<u>Jones v. United States</u> , 362 U.S. 257 (1960)	5
<u>Langford v. Gelson</u> , 364 F.2d 197 (4th Cir. 1966)	6,8
<u>Norton v. Turner</u> , 427 F. Supp. 138 (E.D. Va. 1977)	6,8
<u>Rosner v. Commissioner</u> , 421 F. Supp. 781 (S.D.N.Y. 1976)	5
<u>Schneckloth v. Bustamante</u> , 412 U.S. 218 (1973)	10
<u>Stoner v. California</u> , 376 U.S. 483 (1964)	9
<u>United States v. Bannerman</u> , 552 F.2d 61 (2d Cir. 1977)	5
<u>United States v. Brown</u> , 467 F.2d 419 (D.C. Cir. 1972)	6,7,8
<u>United States v. Ceccolini</u> , 542 F.2d 136 (2d Cir. 1976), cert. granted, ___ U.S. ___, 21 Cr.L.R. 4037 (May 2, 1977)	9,10
<u>United States v. Cravero</u> , 545 F.2d 406 (5th Cir.), cert. denied, ___ U.S. ___, 97 S.Ct. 1123 (1977)	6,7
<u>United States v. James</u> , 528 F.2d 999 (5th Cir. 1976)	6,7,8
<u>United States v. Mapp</u> , 476 F.2d 67 (2d Cir. 1973)	10

<u>Cases</u>	<u>Page</u>
<u>United States v. McKinney</u> , 379 F.2d 259 (6th Cir. 1967)	6,8
<u>United States v. Mullens</u> , 536 F.2d 997 (2d Cir. 1976)	11
<u>Wong-Sun v. United States</u> , 371 U.S. 471 (1963)	10

STATEMENT OF ISSUES

THE COURT ERRED IN REFUSING TO SUPPRESS ORAL AND WRITTEN CONFESSIONS MADE BY DEFENDANT SYMS, SINCE THEY WERE THE PRODUCT OF AN ILLEGAL ARREST ENTRY OF THE HOME OF A THIRD PARTY IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

By an indictment filed in the United States District Court for the District of Connecticut at Hartford on January 13, 1977, the defendant, Victor Wayne Syms, was charged with one count of taking by force, violence, and intimidation \$3540.01 from a federally insured bank on December 20, 1976. Syms was also charged in count three with conspiring to rob the same bank with a co-defendant, Frank Leroy Robinson, all in violation of Title 18, United States Code, §§ 2113(a) and 371.

On January 20, 1977, the defendant was arraigned and pled not guilty to all counts before a United States magistrate in Hartford.

On February 4, 1977, the defendant filed a motion to suppress (App. 7) certain oral and written confessions made to local police and FBI agents on December 25, 1976, concerning the December 20, 1976, robbery. The third ground of this motion alleged that the statements were the product of an illegal search of the home of a third party for which the police had neither a search warrant nor reasonable grounds to believe Syms was in the house.

On February 14 and 16, 1977, the court held a hearing on defendant's motion to suppress and witnesses were called. At the conclusion of the hearing, the court orally denied the motion and filed its Findings of Fact (App. 9) on February 23, 1977.

On March 18, 1977, the defendant pled guilty to count one, the bank robbery count and, by agreement of the court and the government, reserved the right to appeal the court's ruling on his motion to suppress. On April 25, 1977, the defendant Syms received a sentence of fifteen years and the court dismissed count three. On April 26, 1977, the defendant filed a notice of appeal.

On December 20, 1976, the Hartford National Bank and Trust Company, Unity Plaza Branch in Hartford, was robbed by three black males (App. 9). On December 21, 1976, a valid arrest warrant was issued for the arrest of the defendant Victor Syms for the above robbery. This warrant made no mention of either Hampton Street in Hartford or Muriel Walton. The search for Syms was a joint Hartford police-FBI effort (App. 9).

On December 25, 1976, the Hartford police received a phone call from an anonymous tipster that "Syms was present in an apartment at 134 Hampton Street, Hartford" (App. 9). Neither the identity of this caller nor the basis of his information was known to the police either then or now. Having gone to 134 Hampton Street and determining that no one was home, the Hartford police returned to the station (App. 9).

Shortly after his return to the police station, Hartford Police Detective Campbell received another call from an unidentified male who told him that the police had gone to the wrong building. He further told the police that Syms was at 132 Hampton

Street and was planning to leave (App. 9-10). The anonymous tipster claimed to have just seen Syms in the apartment.

The police knew that one apartment in the 132 Hampton Street building was owned or rented by Muriel Walton, the mother of Syms' girl friend, Cassandra Robinson (App. 10). Upon arriving at 132 Hampton Street, the police proceeded to Walton's apartment and, with guns drawn, knocked on the door (pp. 10).

As the three police officers stood in the hallway, Donald Sheets, a boy friend and temporary visitor of Muriel Walton, opened the door to the apartment (App. 10-11). After identifying themselves and entering the apartment, the police asked if Syms was in the apartment and Sheets replied he did not know (App. 11).

Detective Campbell drew his gun and knocked on a bedroom door, which was closed. Cassandra Robinson opened the door about one foot and was told by Campbell that he had a warrant for Syms' arrest (App. 12). Detecting another person in the apartment, Campbell pushed the bedroom door open and observed Victor Syms (App. 12). Campbell then placed Syms under arrest and read him his Miranda warnings (App. 12).

At the apartment, Syms then made an oral admission that Robinson was not involved in the bank robbery. Campbell then volunteered that if it later appeared that she was involved she would be arrested (App. 13).

Syms was then taken to the Hartford police station and placed in an interview room by Detective Campbell (App. 13). Campbell then called FBI Agent Phillip Krumm to inform him of the arrest (App. 14).

When Agent Krumm arrived at the police station at about 6:30 p.m., he spoke briefly to Campbell and then identified himself to Syms, giving him a printed Interrogation and Advice of Rights form (App. 16). This interview with Krumm occurred about one hour and forty-five minutes after Syms' arrest at the 132 Hampton Street apartment of Muriel Walton (App. 10, 16). During this interview, Syms orally confessed to participating in the bank robbery of December 20, 1976, and signed a confession prepared by Krumm.

THE COURT ERRED IN REFUSING TO SUPPRESS ORAL AND WRITTEN CONFESSIONS MADE BY DEFENDANT SYMS, SINCE THEY WERE THE PRODUCT OF AN ILLEGAL ARREST ENTRY OF THE HOME OF A THIRD PARTY IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Syms was a guest or invitee of the lessee or owner of Apartment 102, 132 Hampton Street, on December 25, 1976. As the Supreme Court has held, a guest or invitee always has standing to challenge a search which violates the Fourth Amendment. Jones v. United States, 362 U.S. 257, 267 (1960); see also United States v. Bannerman, 552 F.2d 61, 63 (2d Cir. 1977); Rosner v. Commissioner, 421 F. Supp. 781, 793 (S.D.N.Y. 1976). By his mere presence at his girl friend's mother's home, he had an expectation of privacy in the premises which police officers could not violate unless they were executing a valid search warrant. United States v. Bannerman, supra.

It should be stated at the outset that the defendant does not challenge or put in issue the validity of the warrant for his arrest which had been issued by a United States magistrate prior to the time of the search. It is the defendant's contention, however, that, absent a search warrant, police officers should not have entered the home of a third party, Muriel Walton, unless they had a reasonable belief that Syms was on the premises. ". . . [I]f the police intend to conduct a search of a man's home for a suspect, they must at least

have probable cause to believe that he is on the premises." Langford v. Gelston, 364 F.2d 197, 203 (4th Cir. 1966) (en banc).

While cases deciding the validity of a search usually involve the search for inanimate objects, such as guns or narcotics, the Fourth Amendment is equally applicable to the search of a home for a person.

"The gravity of the invasion is precisely the same whether the policeman's objective is to search for a person or for an inanimate object, and the resulting injury is not mitigated by the fact that the officer may have a warrant to arrest some person but has not bothered to obtain a warrant from a judicial officer to search specified premises--not the premises of the person named in the arrest warrant." Langford v. Gelston, supra at 206.

While the cases in this area of arrest-entry searches differ on whether or not exigent circumstances obviate the need for a warrant, they all concur that the police must at least have a reasonable belief that the suspect is on the premises to be searched. United States v. Cravero, 545 F.2d 406, 414 (5th Cir.), cert. denied, ___ U.S. ___, 97 S. Ct. 1123 (1977); United States v. James, 528 F.2d 999 (5th Cir. 1976); United States v. Brown, 467 F.2d 419 (D.C. Cir. 1972) (Clark, Justice); United States v. McKinney, 379 F.2d 259 (6th Cir. 1967); Norton v. Turner, 427 F. Supp. 138 (E.D. Va. 1977); Fisher v. Volz, 496 F.2d 333, 338-343 (3d Cir. 1974) [reasonable belief plus exigent circumstances required]; Government of Virgin Islands v. Gereau, 502 F.2d 914,

928 (3d Cir. 1974). Even in the search for a violent criminal where exigent circumstances prevent police from first going to a neutral magistrate for a search warrant, the absence of probable cause will always invalidate a search of a private home. Fisher v. Volz, supra at 338-339; Chambers v. Maroney, 399 U.S. 42, 51 (1970).

While some courts use the term "reasonable belief" in the area of arrest entries, it is clear from the context of its use that what is meant is probable cause. Fisher v. Volz, supra at 338; United States v. Cravero, supra at 421; United States v. Brown, supra at 424. Since the only basis for believing Syms was in the apartment of Muriel Walton was an anonymous tip, the court below erred in finding probable cause.^{*/} There is not the slightest indication either in the record or in the court's findings that this anonymous tipster had ever provided any information before or that his reliability could be established by any other means. cf. United States v. James, supra at 1017. Considering he first sent the police to an apparently vacant apartment at 134 Hampton Street, he would appear to be even less reliable than the ordinary anonymous tipster.

^{*/} It is uncertain if the court below ever really considered the question of probable cause to search the Walton apartment where Syms was found. The issues unequivocally raised in defendant's written motion, but most of the court's findings are directed toward the voluntariness of the confession and the existence of proper Miranda warnings.

In this respect, the case is unlike United States v. Brown, supra, where the police believed the defendant was in his girl friend's apartment and personally saw a man fitting the suspect's description inside the apartment. The facts of the instant case, however, more closely parallel the facts in Langford v. Gelston, supra at 202, or United States v. McKinney, supra, where the police, armed with an arrest warrant, proceeded to search the home of a third party solely on the basis of an anonymous tip.

Nor can there be found in the record any facts which could corroborate the information provided in the anonymous tip and raise a mere suspicion on the part of the police to a "reasonable belief." The apartment was known to belong to Syms' girl friend's mother and not to his girl friend. There was no information available to the police at that time that Syms even knew Muriel Walton or anyone else who might live there. None of his known accomplices in the crime were seen in the area of the apartment, nor was a car or anything else belonging to him found outside when Campbell and his associates arrived there on December 25, 1976. cf. Norton v. Turner, 427 F. Supp. 138, 143-145 (E.D. Va. 1977); United States v. James, supra at 1017. Furthermore, no answers or behavior of Sheets who first confronted the police at the door of the apartment lent further credence to any suspicion that Syms might be in the apartment. cf. United States v. Brown, supra [defendant's girl friend reluctant to allow police to enter.]

While the court below found that Sheets "allowed" the police to enter, this finding, even if correct, does not vitiate the illegality of the search (App. 11). Sheets was neither a tenant nor an owner of the apartment in question and, therefore, had no right to waive anyone's constitutional rights. While he undoubtedly was a guest of the tenant, Muriel Walton, it is inconceivable that his rightful presence there carried with it an authorization to allow anyone else inside--least of all armed policemen. Officer Campbell knew that the tenant of Apartment 102 was Muriel Walton, and by inference, anyone else who answered the door was merely a guest (App. 10). Even a claim of apparent authority by the government should be dismissed by this court. As the Supreme Court has said, "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" Stoner v. California, 376 U.S. 483, 488 (1964); see also, United States v. Ceccolini, 542 F.2d 136, 140 n.5 (2d Cir. 1976); cert. granted, ___ U.S. ___, 21 Cr.L.R. 4037 (May 2, 1977).

Secondly, the Findings show that Sheets "allowed" the police into the kitchen and in no way consented to a general search of other rooms, including bedrooms with closed doors (App. 10-11). Thirdly, under the totality of circumstances, it can hardly be said that Sheets voluntarily consented to a search of the apartment. The officers did not tell him or anyone else

of his right to refuse a search. Schneckloth v. Bustamante, 412 U.S. 218 (1973). While Officer Campbell may not have drawn his revolver, the two officers who were just behind him and in plain view of Sheets had their weapons loaded and in their hands (App. 10). Under the totality of circumstances, the court should find that the police officer did not make a consensual entry into 132 Han. Street, Apartment 102. Schneckloth v. Bustamante, supra; United States v. Mapp, 476 F.2d 67, 77 (2d Cir. 1973), and that Sheets simply acquiesced and submitted to an apparently lawful authority. Bumper v. North Carolina, 391 U.S. 543, 548-549 (1968).

Unlike most unlawful searches, where the government is precluded from using inanimate objects found in the search, the defendant concedes that the court cannot condone the outright release of Syms. While the blundering of the constable may not justify the freeing of the criminal, it should certainly justify the suppression of evidence gained from this blunder. Wong-Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Ceccolini, supra. The road from the illegal search and arrest of Syms to the extraction of oral and written confessions from him is straight and uninterrupted.

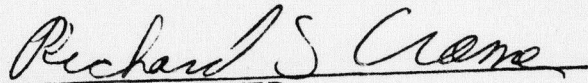
It is true that the court found that Syms was more than once given Miranda warnings prior to making statements. It is also true that the court found that these statements were voluntary in the sense that they were not made as the result of force,

threats, or promises. But only approximately an hour and forty-five minutes separated Syms' illegal "seizure" by Campbell and his statements to Krumm. He was not advised by an attorney prior to the making of the statements. He was continually in custody during this period and no new evidence concerning his involvement in the crime was made known to him by the police. cf. United States v. Mullens, 536 F.2d 997, 1000 (2d Cir. 1976). This court has held that voluntary statements given four months after an illegal search by one not in custody and given his Miranda warnings were not admissible in a perjury trial. United States v. Ceccolini, supra. Furthermore, in the Ceccolini case, the cooperation of the witness, Hennessey, was not considered an intervening factor sufficient to purge Ceccolini's later perjurious statements of their primary taint. A fortiori where a far shorter time period is involved and no third party intervenes to give statements against Syms, this court should find that Syms' inculpatory statements were the product of an illegal search and seizure of his person in violation of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this court reverse the decision of the court below and order that the inculpatory statements of the defendant be suppressed.

Respectfully submitted,

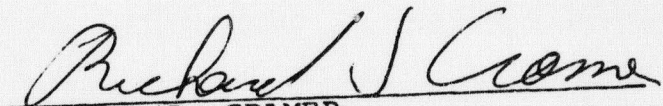


RICHARD S. CRAMER
Assistant Federal Public Defender
450 Main Street
Hartford, Connecticut 06103
(203-244-3357)

Date: June 20, 1977

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of Appellant's Brief and Appendix were mailed to George J. Kelly, Jr., Esq., Assistant United States Attorney, 450 Main Street, Hartford, Connecticut 06103, this 20th day of June, 1977.



RICHARD S. CRAMER
Assistant Federal Public Defender